IN THE

Supreme Court of the United States

SEP 12 1975

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1975

NO. 75-394

BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; PATRICK McDONALD, JAMES HATHAWAY and CORNELIUS GOLIGHTLY, members of the Board of Education of the City of Detroit; and NORMAN DRACHLER, Superintendent of the Detroit Public Schools,

Petitioners,

vs.

WILLIAM J. MILLIKEN, Governor of the State of Michigan and ex-officio member of Michigan State Board of Education; FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate; JOHN W. PORTER, Acting Superintendent of Public Instruction, Department of Education and ex-officio Chairman of Michigan State Board of Education; RONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCHE GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any persons similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO.....

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, et al,

Petitioners,

v.

WILLIAM G. MILLIKEN, GOVERNOR OF THE STATE OF MICHIGAN, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Board of Education of the School District of the City of Detroit [Detroit Board] and other named Detroit Board petitioners respectfully pray that a Writ of Certiorari issue to review the decision rendered in this cause on June 19, 1975, by the United States Court of Appeals for the Sixth Circuit. By Order dated June 24, 1975, the United States Court of Appeals for the Sixth Circuit denied your Petitioners' Emergency Petition for Rehearing of said decision and decreed that the mandate of the Court would issue immediately.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit decided and entered on June 19, 1975, is as yet unreported and appears in the Appendix at 7a. This decision reviewed the May 21, 1975 Memorandum Opinion and Order for Acquisition of Transportation of

the District Court requiring the state defendants to contract and pay for 150 buses.

The Order of the United States Court of Appeals for the Sixth Circuit decided and entered on June 24, 1975, which denied Petitioners' Emergency Petition for Rehearing appears in the Appendix at 11a.

The order of the United States Court of Appeals for the Sixth Circuit, which was entered on June 11, 1975, affirming the result of the order of the District Court for the Eastern District of Michigan requiring the acquisition of school buses and inviting the parties to supply the Court with a fiscal procedure for the acquisition of the buses required by the order of the District Court appears in the Appendix at 6a.

The Memorandum Opinion and Order for Acquisition of Transportation of the United States District Court for the Eastern District of Michigan, decided and filed in May 21, 1975, appears in the Appendix at 1a.[1]

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was entered on June 19, 1975. The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioners' Emergency Petition for Rehearing of said Order was entered June 24, 1975. This Petition for a Writ of Certiorari was timely filed within ninety (90) days.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] The District Court proceedings which led to the May 21, 1975 Opinion and Order requiring the Acquisition of Transportation were pursuant to the remand instructions of this Honorable Court as a result of the decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

QUESTION PRESENTED

Did the Court of Appeals err by modifying the District Court Opinion and Order for Acquisition of Transportation which required the State of Michigan Defendants to finance the total cost for the acquisition of school buses to be used in the implementation of a pupil reassignment desegregation remedy, by requiring that the cost of said acquisition be allocated by 75% of the cost for the State Defendants and 25% of the cost to the Detroit Board Defendants?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions, statutes and rules at issue are: U.S. Const. Amend. XIV; Mich. Const. Art. VIII, § 2, 3; Art. V § 18; Art. IX, §§ 1, 11, 13, 14; Mich. Comp. Laws Ann., §§ 388.1007; 388.1008; 388.1101, et seq. all of which are set forth seriatim in the Appendix beginning at 12a.

STATEMENT OF THE CASE

A. History Of Litigation

On August 18, 1970 Plaintiffs commenced this litigation by filing a Complaint against the Detroit Board, certain of its then individual members and the then Superintendent of Schools, as well as the Governor, Attorney General, State Board of Education and the Superintendent of Public Instruction for the State of Michigan (State Defendants).

The Complaint alleged that the Detroit Public School System was segregated on the basis of race as a result of official policies and actions of the Defendants and

challenged the constitutionality of Act 48 of Michigan Public Acts of 1970 as it affected certain voluntary desegregation plans of the Detroit Board.

After preliminary motions which involved pre-trial appeal to the United States Court of Appeals for the Sixth Circuit[2], the trial on the issue of segregation began on April 6, 1971. On September 27, 1971 the District Court issued its Ruling on the Issue of Segregation and found that all defendants, including the state defendants, were guilty of certain acts of *de jure* segregation within the Detroit school system. *Bradley* v. *Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971).

Thereafter, the District Court, after a hearing on the issue of a remedy confined to the Detroit school system, only, concluded that "that the Court must look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit Public Schools is obvious . . ."[3]

Based upon the aforementioned finding, the District Court ordered the development of a metropolitan desegregation plan.[4] On appeal to the United States Court of Appeals for the Sixth Circuit, first before a three-judge panel and later *en banc*, that Court affirmed the findings of *de jure* segregation and confirmed the concept of a metropolitan plan while remanding the case to the District Court for development of a metropolitan plan consistent with its opinion.[5]

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[2] See, *Bradley* v. *Milliken*, 433 F.2d 897 (6th Cir. 1970); *Bradley* v. *Milliken*, 438 F.2d 945 (6th Cir. 1971).

[3] Findings of Facts and Conclusions of Law in Detroit-Only Plans of Desegregation. (District Court March 28, 1972.)

[4] *Bradley* v. *Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972).

[5] *Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir. 1973).

Thereafter, this Honorable Court granted Writs of Certiorari and issued its opinion reversing the Court of Appeals and the District Court as to a metropolitan remedy and remanded the case to the District Court for the development of a desegregation plan within the city limits of Detroit.[6]

B. Present Status of Litigation

Upon remand from this Honorable Court, the case was assigned on January 6, 1975 to the Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan, replacing the previous trial judge, the recently deceased Judge Stephen J. Roth. Immediately Judge DeMascio began proceedings to develop the Detroit-only remedy ordering the Detroit Board and the Plaintiffs to produce Detroit-only plans for desegregation by April 1, 1975.

The Detroit Board submitted a very detailed proposed plan for the desegregation of Detroit schools, recognizing the extreme complexities in this matter, including the Detroit system's desperate financial situation and its demographic makeup. The Detroit Board plan provided for the transportation of approximately 51,000 students plus the utilization of magnet schools and the development of what are considered essential educational components such as in-service training, redevelopment of curriculum, establishment of vocational high schools, technical high schools and the upgrading of counseling programs, as well as programs of multi-ethnic studies and early childhood development. The Detroit Board plan calls for the proposed expenditure of approximately 60

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[6] *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

million dollars in order to provide for the transportation of pupils and the essential educational components.

The hearings on the two plans commenced on April 29, 1975 and closed on June 16, 1975. During the course of the above hearings, without a plan yet ordered, the District Court on motion by the Plaintiffs, entered a Memorandum Opinion and an Order for Acquisition of Transportation, dated May 21, 1975, which reads in part as follows:

> "1. The State Defendants, including added Defendants Allison G. Green, shall acquire by purchase, lease or other contractual arrangements 150, 66-passenger yellow school buses meeting the requirements of Michigan Law, to be used in the Detroit Desegregation Plan to be implemented by order of the court. Such purchase, lease or other contractual arrangements shall be consummated no later than May 28, 1975;
>
> "2. The State Defendants shall bear the cost of this acquisition, and the State Defendants shall take all necessary steps utilizing funds already allocated, or to be allocated, and by re-allocating existing or new funds, to pay for such transportation acquisition." (Appendix at 5a).

Thereafter, the State Defendants sought a stay in the United States Court of Appeals for the Sixth Circuit from the implementation of said Order. A stay was granted by Order of the Sixth Circuit dated and entered May 27, 1975. Thereafter, arguments were heard by a panel of the United States Court of Appeals for the Sixth Circuit on June 11, 1975. On date even therewith, the Sixth Circuit decided and filed an order affirming the result of the District Court order requiring the acquisition of school buses but delayed a final review of the substantive issues as to who should acquire the buses and pay the cost of the

acquisition pending the receipt of a written procedure from the parties for the prompt acquisition of the transportation equipment.

By order filed and entered on June 19, 1975, the United States Court of Appeals for the Sixth Circuit modified the District Court's original order requiring the State Defendants to pay the full cost of the acquisition as follows:

> "1. The Detroit School Board, defendants, shall acquire by purchase, lease, or other contractual arrangements 150, 66-passenger yellow school buses meeting the requirements of Michigan Law, to be used in the Detroit Desegregation Plan to be implemented by Order of the court. Such purchase, lease or other contractual arrangements shall be consummated no later than July 3, 1975.
>
> "2. The state defendants shall bear the cost of this acquisition to the extent of 75 per cent thereof and the state defendants shall take all necessary steps utilizing existing funds aready allocated, or to be allocated, and by re-allocating existing or new funds, to pay or reimburse the state's share of such transportation acquisition."
>
> (Appendix at 8a.)

By order filed and entered on June 24, 1975, the United States Court of Appeals for the Sixth Circuit denied the Detroit Board Emergency Petition for Rehearing, which the Court interpreted as a request for a stay. (Appendix at 11a.)

The June 19, 1975 order of the Court of Appeals modified the order of the District Court in that the State of Michigan defendants are now only required to finance the cost of the Detroit Board acquisition of transportation equipment by 75 per cent of the total cost thereof rather than being responsible for full payment thereof.

REASONS FOR GRANTING THE WRIT

In converting to a unitary school system in which racial discrimination is eliminated root and branch, it is incumbent upon the school board "to come forward with a plan that promises realistically to work and promises realistically to work *now.*" The obligation of the District Court in the first instance "is to assess the effectiveness of the proposed plan in achieving desegregation", considering the facts at hand and any alternatives to the plan which may be available. *Green* v. *County School Board of New Kent County,* 391 U.S. 430, 439 (1968).

Following the remand from this Honorable Court and in response to the District Court's order, petitioner Detroit Board presented a comprehensive and extensive plan for the desegregation of the public schools within the city limits of Detroit, a system that is now 72% black and 26.5% white and increasing in majority black enrollment at the rate of 2% per year. Both the Detroit Board plan and the plaintiff plan contemplated wide-scale transportation of students.[7] In addition to the transportation of students, however, the Detroit Board plan also provides for magnet middle schools, magnet vocational and technical schools and has built in educational and community-oriented components as safeguards to ensure the vitality of desegregation efforts "now and hereafter." *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, 20 (1969).

As developed at greater length herein, the Detroit Board plan was prepared and presented within the context of

[7] The plaintiff's plan requires the transportation of approximately 77,000 students, while the Detroit Board plan provides for the transportation of approximately 51,000 students.

the changing demographic and fiscal patterns of Detroit. Thus, the multi-faceted desegregation plan of the Detroit Board addressed itself to the community and student body makeup of the city and the Detroit school system which would require more than the mere reassignment of pupils to reduce the effect of the adjudicated constitutional violations.

During the course of the remedy hearing which began on April 29, 1975 and concluded on June 16, 1975, after 29 trial days, 11 of which addressed the issue and the necessity of the Detroit Board's proposed educational components, extensive testimony was taken by the District Court concerning the ability of the Detroit Board to finance a viable Detroit-only desegregation plan and at the same time deliver necessary educational services. It was within this context of assessing the effectiveness of the proposed plans in achieving desegregation, promising realistically to work now, that the May 21, 1975 Order for the Acquisition of Transportation at the complete expense of the state defendants was entered. A portion of the testimony relative to the financial condition of the Detroit Board was on the record at the time of the entry of the Order.

In framing its order requiring the state defendants to finance the acquisition of 150 buses to be used in a pupil reassignment plan of desegregation, the District Court was mindful of its obligation to use its equitable powers not only to remedy past wrongs but to bar similar discrimination in the future. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). As between the state defendants and the Detroit Board, ordering the Detroit Board to pay for the cost of transportation equipment would directly undermine the effectiveness of any Detroit-only desegrega-

tion plan. Having taken testimony on Detroit's financial condition, the District Court was aware that ordering the Detroit Board to pay for transportation equipment would divert necessary educational dollars from student services and would cruelly accentuate the school system's financial plight thus precluding any semblance of quality desegregated education.

A. School Finances

Since 1971, the Detroit school system has experienced a severe financial crisis as a result of the loss of property tax revenues by virtue of urban renewal and highway construction, the exodus of businesses and industry to the suburbs and the concomitant outward population flow from the City of Detroit. Appendix at 24a-25a. As a result of the loss of revenue at the same time the system was experiencing escalating educational costs, the system was forced into what has been termed a "survival" or "suicide" budget under which the Detroit school system is forced to provide only minimal educational services while eliminating many crucial educational services and a number of employee positions. By 1973, the Detroit school system had accumulated a 68 million dollar deficit and was within four days of closing its doors due to the lack of funds. Appendix at 22a, 29a.

As a result of special state legislation, the Detroit system was able to finance its debt and continue operations. However, by law the Detroit Board was required to operate within a balanced budget which has necessitated a continuation of the "survival" budget instituted in 1971.

Despite the fact that the Detroit system has been under strict state control in watching its budget, a 21 million dollar deficit was projected for the 1975-76 school year.

This projected deficit was the result of merely continuing to provide the same minimal services which the Detroit Board provided Detroit public school students in the 1974-75 school year. An additional 7 million dollar deficit was projected in merely attempting to restore some minimal programs which had previously been eliminated such as the provision for substitute teachers, new textbooks and some minor building repair. Appendix at 22a-23a, 29a-30a.

The projected 21 million dollar deficit was based upon a total budget of 314.1 million dollars. In order to conform to state law requiring a balanced budget, the Detroit Board reduced expenditures to meet revenue and will continue the same level of reduced educational services as offered in 1974-75. The 1975-76 budget as approved by the Board in July, 1975 stands at 310.2 million dollars. At the present time there is no possibility of the Board obtaining additional revenue to restore excluded programs and personnel, much less fund a large-scale desegregation plan.[8]

The Detroit school system is financed by property tax as allocated by the Wayne County Tax Allocation Board and as voted by the electors of the school district, by State Aid supplied by the state legislature based upon the number of students in the school district and the State Equalized Value (SEV) of property in the district and by special funds, both in the form of entitlement grant and competitive funds, from the Michigan legislature and from federal

[8] When a desegregation plan is ordered for the Detroit schools, Detroit will be not only the largest school district in the country to implement a desegregation plan, but it will also be the largest majority black school system in the country to undertake such a desegregation effort. In recognition of the monumental task before it, the District Court engaged the assistance of three commissioners to assist in the evaluation of the proposed desegregation plans and the existing factual context in which the Detroit school system operates.

sources. The Detroit Board does not have the power nor the authority to levy an income tax to finance the school operations, nor can the Board levy additional millage without a favorable vote of the electorate.

It is clear that the cost of education is a function of the size of a school district. The Detroit school system with a 1974-75 student enrollment of 257,000 is the largest school district in the State of Michigan, encompassing the largest number of indigent students in the State of Michigan. The cost of providing educational services in Detroit has gone up disproportionately to the continual above-state average drop in school enrollment. The declining enrollment necessarily adversely affects the incoming state aid based upon the number of pupils in the school district. Appendix at 28a.

The Detroit school system operates within the financial limitations placed upon the citizens/electors of the City of Detroit who pay a total tax burden which is three times as heavy as the average city tax of the 20 largest cities in Michigan. Appendix at 24a.

Additionally, the City of Detroit taxpayers shoulder the highest municipal overburden in the state. Detroit citizens' non-school taxes are 211 per cent higher than the state average. Appendix at 31a-32a.

The Detroit county taxes are 14.4% higher than the State average; municipal taxes are 146% higher than the state average, thus putting Detroit taxpayers in the position of paying 28.58% higher property tax rate than the state average. Appendix at 30a-31a.

Thus, the total municipal millage equivalent paid by Detroit taxpayers is 84.83 mills, the highest tax burden in the state, which is 55% higher than the state average.

Only fifteen other Michigan cities levy an income tax and among them Detroit has the highest tax rate, but the per capita income tax yield in Detroit is substantially lower than the other 15 cities.

Over the last five years, Detroit's SEV has remained relatively static in comparison to the increasing SEV of the balance of the state. The per capita SEV in Detroit is 50% lower than the average for the 20 largest cities in Michigan, thus requiring more millage to be levied on Detroit taxpayers to obtain an equal yield to that of other cities which levy less millage.

The State School Aid Act provides a power equalizing formula to supply a more uniform flow of state revenues to school districts in order to remedy the widely variant per pupil SEV tax yield expenditures on students among districts. Under the present form of the power equalizing section of the School Aid Act [Bursley Act MCLA 388.1121; MSA 15.1919 (521)], the maximum state guarantee of $975.00 per student is contingent upon a local district millage levy of 25 mills for operating purposes. The Detroit Board presently levies 22.51 mills for operating purposes and 2.25 mills for debt service retirement pursuant to P.A. 1 and 2 of 1973 to finance the prior 68 million dollar deficit incurred by the district, giving the district a total millage effort of 24.76 mills.

While the total 24.76 mills is counted in the formula, the 2.25 mills for debt service does not result in State Aid to the school board for operating purposes. Additionally, the Detroit Board will receive .64 of a mill in revenue from the Wayne County Tax Allocation Board which will be passed directly onto the Public Library Commission pursuant to law. This .64 of a mill should count in the State

Aid calculation, thus giving the Detroit Board a total levy of 25.40 mills and entitle the Detroit district to the maximum state aid guarantee under the power equalizing section of the Act. Presently, the Detroit Board millage effort results in $916.00 per pupil State Aid.

While the Detroit Board millage levy is slightly below the state average of 26.15 mills, the millage levy in addition to all other taxes in Detroit (county, city property, city income, city utility) results in a cumulative tax burden on Detroit taxpayers which is greatly in excess of the state average. Appendix at 26a, 31a.

Furthermore, in the last ten millage elections over the past eight years, seven propositions have failed with one of the passing votes merely replacing a one per cent income tax pursuant to P.A. 1 and 2 of 1973 with a 7 mill property tax, and another passing vote merely renewed 7.5 mills for ten years. It can be reasonably expected that the already heavy tax burden upon Detroit taxpayers will cause them to reject further requests for millage increases in the near future.

The municipal tax overburden of Detroit is a function of its size and the result of the many municipal services provided by Detroit which are not provided or required by other municipalities but which are utilized by citizens from the entire southeastern Michigan area.

The municipal overburden inequities suffered by the various districts have been recognized by the state. State aid is supplied school districts whose municipal overburden is in excess of 125% of the state average. [**Bursley Act,** MCLA 388.1125; MSA 15.1919 (525)]. The overburden section of the Act recognizes the inability of various school districts such as Detroit to raise sufficient tax revenues to

deliver quality educational services due to the inability to levy high millage in the face of numerous other municipal taxes shouldered by the taxpayers. Appendix at 26a.

While the power equalizing membership section of the Act [MCLA 388.1121; MSA 15.1919 (521)], in which all qualifying school districts can share, is fully funded, the municipal overburden section of the Act is presently funded by only approximately 28% of the total amount authorized. Detroit, with the greatest overdurden in the state, presently receives 91% of the allocated funds in the overburden section of the Act pursuant to the formula.[9]

In addition to the economic straight jacket which the Detroit Board finds itself in, the school system must undergo the desegregation process without the benefit of a pre-existing bus transportation system. Prior to a 1971 legislative enactment, the Detroit school system was not eligible for in-city transportation reimbursement by the State, while rural areas and certain other "suburban" school districts within Wayne County were reimbursed for transportation costs up to 75 per cent. Appendix at 27a-28a.

The Detroit school system first received an allocation for transportation costs in the 1973-74 school year, which was based upon costs expended during 1972-73. However, unlike other school districts, which were reimbursed for 75 per cent of their transportation expenditures, the Detroit school system was reimbursed for only 92 per cent of the

[9] If the municipal overburden section of the Act were fully funded, the Detroit school system would receive an additional $61,682,000. If it were funded by 50% (as was done in 1972-73), the system would receive an additional $18,787,000 more than is presently received. It is clear that the State of Michigan does not provide the Detroit Board with all the money in its state aid which it should or could.

75 per cent permitted under the Act. Appendix at 32a-33a. Moreover, reimbursement for the Detroit school system was based upon the Wayne County average transportation costs of $47.00 per pupil, while the Detroit school system actually expended $185.00 per pupil. Appendix at 28a.

Therefore, while other school districts were able to obtain and maintain school bus fleets based up State reimbursement of transportation costs, until 1971 (the same year in which Detroit was building up a 68 million dollar deficit), the Detroit school system was ineligible to receive similar reimbursement for in-city transportation. Thus, when the May 21, 1975 District Court Order required the acquisition of 150 school buses costing approximately 2.6 million dollars, the Order represented the first substantial impetus for the Detroit Board to acquire a bus fleet similar to those already acquired at substantial State expense by other school districts throughout the State of Michigan.

It is therefore axiomatic that the Detroit Board with fiscally dictated reduced educational offerings presently in effect cannot underwrite a desegregation plan and continue to provide any semblance of quality education.

B. The State Defendants are Proper Parties to Assist in a Court Ordered Remedy Inasmuch as They Have Been Found to be a Cause of the Constitutional Violations in the Detroit School System.

When the District Court ordered the acquisition of transportation equipment at state expense, the Court was implementing a prospective injunctive remedy in the context of the financial needs of the Detroit system, vis-a-vis the realistic implementation of a Detroit-only desegregation plan. From the outset of the remedy hearings, indeed from the outset of the original violation stage of the lawsuit,

the state defendants have resisted any involvement in assisting in the remedy of the constitutional violations which have been found in the Detroit system.

In resisting any efforts to compel the state defendants to finance the acquisition of the bus transportation equipment, the state defendants have argued two basic erroneous theories: (1) Inasmuch as no constitutional violations have been proven against the state defendants in the area of school district finance, there is thus no duty by the state defendants to disperse state funds from the state treasury for the acquisition of bus transportation; and (2) the Eleventh Amendment bars an order compelling the payment of unappropriated state funds from the state treasury to purchase bus equipment for Detroit.

Even a cursory review of the two lower court orders in this matter reveals that these mistaken principles were quickly dispatched and held for naught. However, the decision of the United States Court of Appeals for the Sixth Circuit rendered on June 19, 1975 nonetheless conflicts in principle with decisions of this Court and other courts of appeals insofar as it modifies the equitable determination of the District Court in allocating the full expense of the bus purchase to the state defendants.

First and foremost, the state defendants mistakenly believe that based upon the decision of this Honorable Court herein[10] there is no adjudicated constitutional violation attributed which would serve as a predicate for a remedial order directing them to assist in the implementation of a remedy in the Detroit school system. The error of such a position is readily apparent.

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[10] *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

The District Court opinion originally issued on September 27, 1971 found:

> (1) That the Detroit Board of Education is an instrumentality of the State and subordinate to the State Board of Education and that the State Board bears responsibility for segregative acts which have occurred in the Detroit school system;
>
> (2) That through Act 48 (Mich Pub Acts of 1970) the State acted to impede, delay and minimize racial integration in the Detroit schools;
>
> (3) That under State law, prior to 1962, the State Board had authority over construction plans and was, therefore, responsible for segregated results which may have occurred as a result of construction in the Detroit System;
>
> (4) That the method of State support for transportation of school children directly discriminated against Detroit by not providing transportation funds to Detroit on the same basis as those to suburban districts;
>
> (5) That the transportation of black high school students from the Carver School District to a virtually all black Detroit school had the "tacit" approval of the State Board. *Bradley* v. *Milliken*, 338 F. Supp. 582 (E. D. Mich. 1971)

The holdings of the District Court were repeated verbatim and specifically affirmed by the Sixth Circuit Court of Appeals which concluded:

> "The discriminatory practices on the part the Detroit School Board *and the State of Michigan* revealed by this record are significant, pervasive and causally related to the substantial amount of segregation found in the Detroit School System by the

> District Judge." *Bradley* v. *Milliken*, 484 F. 2d 215, 241 (6th Cir. 1973) (Emphasis added).[11]

The state defendants sought to specifically overturn these rulings when they filed their Petition for Writ of Certiorari in this Court. Said Defendants asked this Court to rule on this matter of State participation in *de jure* segregation in the Detroit system and to overturn the findings of the District Court and the Sixth Circuit.[12]

The majority opinion of the Supreme Court itemized the findings of the Sixth Circuit with respect to the State's violations and acknowledged the pervasive State control and responsibility for education in Michigan. *Milliken* v. *Bradley*, 418 U.S. 717, 725-728 (1974). This Honorable Court then concluded:

> "Our assumption, *arguendo* . . . that State agencies did participate in the maintenance of the Detroit system, should make it clear that it is not on this point that we part company [with the minority]." *Milliken, supra*, 418 U.S. at 746.

Even a cursory reading of the opinion of this Court reveals that the majority did not overturn the findings of State responsibility for *de jure* segregation within the Detroit school system even though the Court was specifically asked to do so. Rather, this Court accepted the findings of the District Court and the Sixth Circuit with respect to the State involvement in the Detroit-only violations, but held that these violations did not have a sufficient inter-district effect to form the "foundation for inter-district relief". *Milliken, supra*, 418 U.S. at 752.

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[11] See also, 484 F. 2d 215, 238-241, for the reiteration of the constitutional violations and the delineation of the State responsibility for leadership and general supervision over all public education in Michigan.

[12] See Petition for Writ of Certiorari of Defendants Milliken, et al. at 12.

Furthermore, nowhere in the majority opinion were the state defendants exonerated or excused from their responsibility to participate in the implementation of a desegregation remedy for the Detroit school system.

In an attempt to avoid their responsibility for having fostered or encouraged a racially discriminatory school system, said Defendants appear to assert that inasmuch as the majority opinion of the Supreme Court stated that the inherent inequities in the area of school district finance, including State school aid appropriations, did not provide a basis for an inter-district remedy,[13] the District Court is precluded from requiring the state defendants to disburse State funds for a Detroit desegregation remedy. The basis for this argument rests on the theory that the nature of the violation determines the scope of the remedy. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The State reasons that there being no constitutional violation relative to school district finance, there is thus no predicate for compelling said Defendants to disburse unappropriate State funds from the State Treasury as an incident to the implementation of a Detroit desegregation remedy. To articulate the theory is to expose its absurdity. If the equity power of a Federal Court as enunciated in *Swann, supra*, was simply limited to ordering Defendants to correct constitutional violations by using those same tools—and only those tools—which had been employed to create the unconstitutional condition, then every school desegregation case would have to demonstrate sufficient financial discrimination to allow said Defendant to employ finances to remedy the condition.

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[13] *Milliken, supra*, 418 U.S. at 751-752.

Clearly, the Fourteenth Amendment directs its proscriptions against any "State" denying any individual equal protection of the law. If the Constitution and Supremacy Clause are to have any substance at all, the courts must be free to devise workable remedies against the political entities with the effective power to remedy "the condition that offends the Constitution". *Swann, supra*, 402 U.S. at 16. Thus, State officials may be ordered to take the necessary measures to completely eliminate from the Detroit Public schools "all vestiges of State-approved segregation." *Id.*, at 15; See also, *Bradley* v. *Milliken*, 338 F. Sup. 582, 593-594 (E. D. Mich. 1971).

The state defendants rely on the Sixth Circuit decision in *Higgins* v. *Grand Rapids Board of Education*, 508 F. 2d 779 (6th Cir 1974) for the broad conclusion that the Michigan system of transportation reimbursement is not discriminatory. However, a reading of *Higgins* refutes that contention. In *Higgins*, the Sixth Circuit specifically distinguished that case from the instant case when the Court held:

> "We are not bound to conclude otherwise by the finding of the Court in *Milliken* that the State of Michigan was involved in creating an illegally segregated system in Detroit. Similar actions by the state can be found to be a violation in another city, depending on whether the local board was at the same time using the state's policies to further a program of purposeful segregation." 508 F. 2d at 796.

The above-cited language clearly refutes the contention of the state defendants that Michigan's system of transportation reimbursement is non-discriminatory. Just the opposite is true with regard to the instant case, as recognized by the Sixth Circuit in *Bradley* and *Higgins*.

Additionally, *Brinkman* v. *Gilligan*, 503 F. 2d 684 (6th Cir. 1974) involved the desegregation of the Dayton school system. The District Court dismissed the Ohio State Defendants from the remedy proceedings. In reversing, the Sixth Circuit Court directed that the Ohio State Defendants be kept in as parties for the remedy proceedings. In so holding the Sixth Circuit relied on the fact that:

> "Finally, during the years in question in this case, the Dayton school district was denied any allocation of state funds for pupil transportation, although such funds were made available to most suburban and rural school districts in the state." 503 F. 2d at 704.

Not only do *Brinkman*, *Higgins* and *Bradley* clearly indicate that the type of transportation reimbursement system which was used in Michigan can be a predicate for a finding of *de jure* segregation against the state but also establish that the state can be held responsible for remedying the segregation.

Two other Circuits have concluded that State agencies and officers have an affirmative duty to assist in the remedy of a school desegregation case. In *United States* v. *Board of School Commissioners of Indianapolis*, 503 F.2d 68, 80, 82 (7th Cir. 1974), the Seventh Circuit determined that the Eleventh Amendment argument was spurious and found an affirmative duty on the state defendants to assist the remedy.

In *Morgan* v. *Hennigan*, 379 F.Supp. 410, 477 (D. Mass. 1974), *aff'd sub. nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), the Court found no constitutional violation by the state defendants, but recognized the need to have the resources of those parties with state-wide control of edu-

cation and retained jurisdiction over them for assisting in a remedy.

Inasmuch as the state defendants have been found guilty of *de jure* segregation, they have an obligation to remedy the existing segregation without curtailing the necessary educational programs presently in operation in Detroit schools.

> "As part of the state's obligation to eliminate segregation there is, of course, a concomitant obligation to insure that there is no diminution in the quality of education . . ." *Hart* v. *Community School Board of Brooklyn*, 383 F.Supp. 699, 741 (E.D. N.Y. 1974), aff'd. 512 F.2d 37 (2d Cir. 1975).

The order of the Sixth Circuit Court of Appeals herein runs contrary to the admonition in *Hart* and contrary to sound principles of equity and law.

C. The Decision Below Conflicts in Principle With Decisions of this Court and Other Courts of Appeals

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970), this Court stated:

> ". . . a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, *by a balancing of the individual and collective interests*, the condition that offends the Constitution." 402 U.S. at 15. (Emphasis added).

The May 21, 1975 Order of the District Court clearly balanced the individual and the collective interests in mandating that the state defendants finance the bus acquisition. The state defendants have been adjudicated a substantial cause of the segregation which has been found to exist with-

in the Detroit school system due, *inter alia*, to the legislative recission of the Detroit Board's voluntary desegregation plan of 1971; the power of prior approval for any new school site construction; and the denial to the Detroit system of State Aid funds necessary for the reimbursement of pupil transportation costs prior to the 1973-74 school year. *Bradley* v. *Milliken*, 338 F.Supp. 582, 589 (E.D. Mich. 1971). The findings against the state defendants were affirmed by the Sixth Circuit Court of Appeals, *Bradley* v. *Milliken*, 484 F.2d 215, 238-239 (6th Cir. 1973), and these findings were not disturbed by this Court. *Milliken* v. *Bradley*, 418 U.S. 717, 738, n.18 (1974).

Given the fact that the state defendants contributed to the segregated condition in Detroit, it is within the District Court's broad equity power to require the state defendants to remedy this segregated condition. *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 187 (6th Cir. 1974), *cert. denied*, ... U.S. ..... (1975); *Evans* v. *Buchanan*, 379 F.Supp. 1218, 1221-1222 (D. Del. 1974).

It should be unquestioned that in providing a remedy, a federal court has the power to order state defendants to expend state funds to finance a desegregation plan. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 233 (1964); *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 186, 187 (6th Cir. 1974); *Bradley* v. *Milliken*, 484 F.2d 215, 258 (6th Cir. 1973), rev. on other grounds, *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Evans* v. *Ennis*, 281 F.2d 385, 392 (3rd Cir. 1960); *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817 (5th Cir. 1969); *Hart* v. *Community School Board of Brooklyn*, 383 F.Supp. 699, 756 (E.D. N.Y. 1974), *aff'd.* 512 F.2d 37 (2nd Cir. 1975).

Given the findings of state violations, the consequent remedial obligation of the Fourteenth Amendment and the inclusion of the necessary state party defendants in this action, sound logic and settled law dictate that the state defendants are the proper parties to finance the acquisition of transportation equipment. In *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*), this Court stated:

> "In fashioning are effectuating the decree the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." 349 U.S. at 299-300.

In requiring the state defendants to pay for school buses, the District Court followed the mandate of *Brown II* and *Swann, supra,* in balancing the collective interests and in reconciling the public and the private needs. Faced with several defendants which were theoretically available to implement a desegregation remedy, the District Court concluded that the state defendants were the proper parties to pay for transportation equipment.

The conclusion of the Sixth Circuit Court of Appeals countering the decision of the District Court by holding that the state defendants would be required to pay only 75% of the transportation acquisition costs is negated by *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971), where this Court discussed the inapplicability of state policy as a hinderance to the vindication of federal constitutional rights.

In *North Carolina State Board of Education, supra,* this Court stated:

> "If a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the

> operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." 402 U.S. at 45.

Thus it is no defense for the state defendants to assert that to require the state to finance the entire cost of the transportation acquisition would be beyond any clear statutory authority in Michigan.[14]

The simplistic reasoning of the state defendants seeks to insulate said defendants from federal court remedial orders. The obligation to rectify an unconstitutional condition rests on the state. The Fourteenth Amendment prohibition against unequal treatment addresses itself specifically to state action. In the instant case, both the constitutional right and the state's Fourteenth Amendment violations have concededly been fully established. There is no acceptable reason for permitting the party responsible for a constitutional violation to restrain the remedial powers of the District Court by subordinating the constitutional remedy to pay ritualistic homage to the administrative expediency of legislation which merely provides local school boards with

[14] The position taken by the state defendants resolves itself into the essential proposition that inasmuch as the legislature, charged with the duty of maintaining and supporting a system of schools (Mich Const. Art. VIII, § 2) has authorized the various school boards — including the Detroit Board — to carry on the general day-to-day operation of the school systems, the District Court should therefore arrest its equitable discretion in fashioning a remedy and should simply require the school board to shoulder the complete remedial burden. It was on this basis that the state defendants appealed the May 21, 1975 Order of the District Court requiring the state defendants to pay the total cost of acquisition. A panel of the Sixth Circuit Court of Appeals modified this Order by requiring the Detroit Board to acquire the buses and pay 25% of the acquisition costs. The 75%/25% financing ratio appears to follow the Bursley Act state transportation reimbursement allotments. MCLA 388.1171; MSA 15.1919(571). Appendix at 19a-21a.

the parameters within which to operate under state control and auspices.

Nevertheless, the state defendants still contend that they have delegated away all of their legal and moral responsibility for their adjudicated unconstitutional acts in the Detroit system. This instant argument has already been rejected in the course of these proceedings during the violation stage of the litigation.

> "That a state's form of government may delegate the power of daily administration of public schools to officials with less than statewide jurisdiction does not dispel the obligation of those who have broader control to use the authority they have consistently with the constitution." *Bradley* v. *Milliken*, 338 F.Supp. 582, 593 (E.D. Mich. 1971).

Indeed, the foregoing statement echoes the policy enunciated by this Court in *Cooper* v. *Aaron*, 358 U.S. 1 (1958):

> "The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties . . . can also be brought under control by state action." 358 U.S. at 16.

Given the broad, pervasive state control which is exercised over local public education in Michigan, and in further view of the broad state involvement in the unconstitutional school condition in Detroit, the error of the decision of the Sixth Circuit Court of Appeals in this matter becomes more compelling. Initially, the 75%/25% state/Detroit Board financing order might appear to be equitable and just. However, one should bear in mind the fact that the Detroit Board must initially shoulder the entire burden of the approximately 2.6 million dollar acquisition cost. At the present time, the Board is funding the total purchase price of the

buses through the issuance of the school district's general obligation bonds.

Over a period of approximately seven years, the state defendants shall reimburse the Detroit Board for 75% of the acquisition cost. Should additional buses be required, or should additional financing of the desegregation plan be necessary, the Detroit Board would be completely helpless in locating the funds to underwrite such additional cost. As recited in the School Finances section, *supra*, the Detroit Board has exhausted its financial resources. Further, the district has exhausted the market for its bonds.

In a recent *en banc* decision of the United States Court of Appeals for the Eighth Circuit, the question of financing a school desegregation remedy was presented and the Eighth Circuit, after reviewing state policy and state law relative to finances, arrived at a decision contrary in principle to the decision of the Sixth Circuit Court of Appeals herein.

In *United States* v. *State of Missouri*, ... F.2d ..... (8th Cir. Filed May 14, 1975), the entire panel of the Eighth Circuit Court of Appeals reviewed a District Court remedial order directing the annexation of two Missouri school districts with a third school district and the consequent financial scheme established by the court to underwrite the cost of a desegregated education. The District Court had ordered a tax rate for the three consolidated school districts at a figure in excess of the allowable tax rate under the Missouri Constitution. The Eighth Circuit Court of Appeals affirmed the equity power of the District Court to direct that provision be made for the levying of taxes essential to the operation of the new desegregated school districts by stating:

> "It is anomalous to suggest that the District Court has the power to disestablish a dual school system but does not have the power to fashion an appropriate remedy. [Citing *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971)]. Slip opinion at 14.

Similarly, "expenditure of public funds [was] no bar to corrective action" in *Hart, supra*, 338 F.Supp. at 756. By failing to perform its own constitutional and statutory duties and by failing "to take the many available measures against [school] officials for the segregative actions", *Oliver, supra*, 508 F.2d at 187, the state defendants have become the proper parties to bear the primary cost of any desegregation plan. *Buchanan, supra*, 379 F.Supp. at 1222. The remedial power of the federal courts under the Fourteenth Amendment is not limited by state law. *State of Missouri, supra*, slip opinion at 14; *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364, 368 (8th Cir. 1970).

The decision of the Sixth Circuit Court of Appeals in this case is apparently founded upon the erroneous premise that the judicial power of the federal courts must follow, as closely as possible, state policy and procedure regardless of its effect upon a desegregated education. Such an erroneous premise is unfounded in law, presents faulty precedent and ultimately serves to further penalize the school children in the Detroit system rather than assist in affording them a realistic and workable remedy for an unconstitutional condition.

Insofar as the May 21, 1975 order of the District Court requires the state defendants to fully finance the acquisition of the 150 school buses, it was consistent with the law of the land and the discretionary equity power of the court.

Insofar as the June 19, 1975 order of the United States Court of Appeals for the Sixth Circuit modified the District Court order by allocating 25% of the cost of the transportation acquisition to the Detroit Board, said decision is in direct and irreconcilable conflict with decisions of other United States courts of appeal as well as decisions of this United States Supreme Court and completely at odds with the discretionary equity power of the District Court. Consequently, the need for the exercise of this Court of its supervisory powers over the court below warrants the grant of Certiorari at this time.

CONCLUSION

For the reasons stated above, it is respectfully submitted that it is imperative that this Court issue its Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
George T. Roumell, Jr.

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Members of the Board of Education,
of the City of Detroit and
Norman Drachler, Superintendent
of the Detroit Public Schools.

Dated: August 29, 1975.

UNITED STATES DISTRICT COURT
EASTERN DISRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al.,

Plaintiffs,

v. Civil No. 35257

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,

Defendants.

MEMORANDUM OPINION

DeMASCIO, J.

Plaintiffs have filed a motion seeking an order requiring the Detroit Board and State Defendants to acquire by purchase, lease, or charter, transportation equipment which meets the standard requirement of state law.[1] Plaintiffs contend that all parties agree that transportation must be arranged in May to ensure the availability of such vehicles for the 1975-1976 school year. They argue that the U.S. Supreme Court has decreed that plaintiffs' remedy has been too long delayed. They further argue that should this court now fail to act, their constitutional right to a unitary school system will be delayed by arbitrary schedules of bus manufacturing companies.

The Detroit Board concurs in plaintiffs' motion but insists that since the State Defendants have been found liable for contributing to *de jure* segregation in Detroit, the State be required to bear the financial burden. The Board also

[1] Plaintiffs' motion adopts the Detroit Boards' estimate that approximately 300, 66-passenger buses are necessary to implement a desegregation plan. Plaintiffs' sole concern is that the transportation be available. Plaintiffs suggest that the State Board be required to provide the transportation by rearranging existing budgets and by using funds appropriated or to be appropriated for school transportation.

contends that it is unable to finance the purchase of vehicles.[2]

The State Defendants do not oppose the need to order vehicles. However, they protest that portion of the motion which requests that the State provide the buses. They contend that there must be a violation regarding school finance before the court may order the State to finance the cost of transportation and without such a constitutional violation upon which to predicate the remedy, they may not be called upon to supply the transportation. We reject this contention. Once it is determined that the State has committed *de jure* acts of segregation, it may be required by court order to correct their violation. *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 187 (6th Cir. 1974), *cert. den.*, ... U.S. ..... (1975); *Evans* v. *Buchanan*, 379 F.Supp. 1218, 1221-1222 (D. Del., 1974); *Hart* v. *Community School Board of Brooklyn*, 383 F.Supp. 699, 756, (E.D. N.Y. 1974); *Bradley* v. *Milliken*, 484 F.2d 215, 258 (6th Cir. 1973).

The State Defendants also argue that they are precluded by State law from authorizing and funding the purchase of vehicles. However, an order of this court, dated July 11, 1972, required the State to bear the cost of acquisition of vehicles necessary to desegregate Detroit under the Metropolitan Plan. The Sixth Circuit Court of Appeals vacated that order but only because the metropolitan remedy aspects required further hearings. The Court of Appeals stated:

[2]The latter argument, however, lacks merit since the constitutional mandate for operating a unitary school system may not be made contingent upon the financial condition of a school district. *United States* v. *School District 151 of Cook County, Ill.*, 301 F.Supp. 201, 232 (N.D. Ill., 1969), *aff'd*, 432 F.2d 1147 (7th Cir. 1970), *cert. den.*, 402 U.S. 943; *Goss* v. *Board of Education of Knoxville*, 482 F.2d 1044, 1046 (6th Cir. 1973).

> "In the exercise of its equity powers, District Court may order that public funds be expended, particularly when such an expenditure is necessary to meet the minimum requirements mandated by the constitution." 484 F.2d at 258[3]

Finally, the State Defendants contend that plaintiffs' motion is premature because until there is a plan it is impossible to order the required number of buses. Like the State, we are concerned that until an appropriate plan is approved, there is no way to determine the precise number of vehicles required. There are many proposals advanced in both plans that the court must yet scrutinize. The evidence thus far does not accurately disclose whether the Detroit Board's count of pupil transfers is reliable when it more than doubles the count made by the court; whether either or both plans adequately consider components designed to discourage resegregation; whether children are unnecessarily being transported away from neighborhood schools which are already integrated; whether a comparable degree of desegregation can be accomplished by redrawing attendance zones; whether the pairings and clusters selected are the most desirable and equitable; whether the proposed new assignments respect, when equally feasible, the neighborhood school concept, whether the Detroit Board will be capable of managing a transportation system; whether the Board can devise a transportation network that is computer based to provide a more

[3]The State further argues that to require the State to supply the transportation, violates the Eleventh Amendment. This court, however, disposed of this argument in its March 12, 1975, order. It was there stated: "In any event, the Eleventh Amendment does not bar suits seeking prospective injunctive relief, nor is such injunctive relief objectionable because it requires an incidental expenditure of funds from the state treasury. *Ex parte Young*, 209 U.S. 123 (1908); *Edelman* v. *Jordan*, 415 U.S. 651 (1974)."

efficient system; and there are still other issues to be resolved.

Nevertheless, should this court complete this monumental task prior to the 1975-1976 school year, the unavailability of transportation would preclude implementation of a court-approved plan. This is a constitutionally impermissible result. It would frustrate the Supreme Court mandate to desegregate the Detroit School System now. *Bradley* v. *Milliken*, 418 U.S. 717, 753 (1974); *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 438 (1968). On balance, we are of the view that little harm will result by the grant of plaintiffs' motion utilizing the State's estimate of the number of vehicles required. Busing students is not novel in this school system. The Detroit Board currently utilizes approximately 200 buses. They presently bus pupils to relieve overcrowding, to all magnet schools, to special education schools, and to avoid hazardous conditions. Whether or not a plan is approved in time for the 1975-1976 school year, the Detroit Board can always absorb the vehicles made available by this order for its current needs. Moreover, since jurisdiction over this cause is continuing, the court can amend or supplement the provisions of its order when and as developing circumstances require.

Accordingly, the motion is granted.

/s/ ROBERT E. DeMASCIO
United States District Judge

Dated: May 21, 1975

(Title of Court and Cause)

ORDER FOR ACQUISITION OF TRANSPORTATION

Plaintiffs having moved for an order requiring the purchase of transportation equipment, and the court having reviewed the briefs submitted by the parties and having considered the arguments of counsel and being fully advised in the premises;

IT IS, THEREFORE, ORDERED, pursuant to *Bradley* v. *Milliken*, 484 F.2d 215, 258 (6th Cir. 1973), *rev. on other grounds*, 418 U.S. 717 (1974), that the Order for Acquisition of Transportation entered by this court on July 11, 1972, be and hereby is reinstated but modified as follows:

1. The State Defendants, including added defendant Allison Green, shall acquire by purchase, lease or other contractual arrangements 150, 66-passenger yellow school buses meeting the requirements of Michigan Law, to be used in the Detroit Desegregation Plan to be implemented by order of the court. Such purchase, lease or other contractual arrangements shall be consummated no later than May 28, 1975;

2. The State Defendants shall bear the costs of this acquisition, and the State Defendants shall take all necessary steps utilizing existing funds already allocated, or to be allocated, and by re-allocating existing or new funds, to pay for such transportation acquisition.

/s/ ROBERT E. DeMASCIO
United States District Judge

Dated: May 21, 1975

No. 75-1668
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRADLEY, ET AL.,
Plaintiffs-Appellees,

v. ORDER

MILLIKEN, ET AL.,
Defendants-Appellants.

Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

This is an appeal from an order of the United States District Court for the Eastern District of Michigan requiring the State defendants to acquire 150 buses to be used in the Detroit desegregation plan to be implemented by the order of the District Court. The case was submitted on briefs and oral arguments this June 11, 1975.

Upon consideration, this court concludes that the District Judge had no choice, under the decision of the Supreme Court in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), except to order the immediate acquisition of school buses. No party to the proceeding made any representation to the contrary during the course of the hearing in this court.

Likewise, this court has no choice under the decision of the Supreme Court except to affirm the result of the order of the District Court requiring the acquisition of school buses now. Therefore, the decision of this court is to affirm the result of the order of the District Court for the immediate acquisition of school buses. Our objective is that this result be accomplished in a manner which will not further cripple the educational opportunities of students in the Detroit school system or the educational

functions of the Board of Education of the School District of the City of Detroit.

This court would like for the order which we will enter implementing this decision to be consistent with the established fiscal procedures of the State of Michigan and of the Board of Education of the School District of Detroit.

To this end the court invites the appellants, the Governor and Attorney General of Michigan, to supply to this court in writing a procedure for the prompt acquisition of the number of school buses required by the order of the District Court which will be consistent with sound fiscal policies and will not further curtail the educational opportunities of students in the Detroit school system or the educational functions of the Detroit Board of Education.

Four legible copies of this procedure will be submitted to the Clerk of this court on or before Tuesday, June 17, 1975.

All other matters are reserved.

Entered by order of the court.

/s/ JOHN P. HEHMAN
Clerk

(Title of Court and Cause)

Before: PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

This is an appeal from an order of the United States District Court for the Eastern District of Michigan requiring the State defendants to acquire 150 buses to be used in the Detroit desegregation plan to be implemented

by the order of the District Court. The case was submitted on briefs and oral arguments this June 11, 1975.

Upon consideration, this court concludes that the District Judge had no choice, under the decision of the Supreme Court in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), except to order the immediate acquisition of school buses. No party to the proceeding made any representation to the contrary during the course of the hearing in this court.

Likewise, this court has no choice under the decision of the just cited decision of the Supreme Court except to affirm the result of the order of the District Court requiring the acquisition of school buses now, as herein modified. This modification is based upon the representations to this court made by the State defendants and is consistent with the spirit and purposes of the constitutional and statutory provisions and the case law of the State of Michigan as recited in said representations. Said order is modified to read as follows:

Plaintiffs having moved for an order requiring the purchase of transportation equipment, and the court having reviewed the briefs submitted by the parties and having considered the arguments of counsel and being fully advised in the premises:

IT IS, THEREFORE, ORDERED, pursuant to *Bradley* v. *Milliken*, 484 F.2d 215, 258 (6th Cir. 1973), *rev. on other grounds*, 418 U.S. 717 (1974), that the Order for Acquisition of Transportation entered by this court on July 11, 1972, be and hereby is reinstated but modified as follows:

1. The Detroit School Board, defendants, shall acquire by purchase, lease or other contractual arrangements 150, 66-passenger yellow school buses meeting the requirements

of Michigan Law, to be used in the Detroit Desegregation Plan to be implemented by order of the court. Such purchase, lease or other contractual arrangements shall be consummated no later than July 3, 1975.

2. The State defendants shall bear the costs of this acquisition to the extent of 75% thereof[1] and the State defendants shall take all necessary steps utilizing existing funds already allocated, or to be allocated, and by reallocating existing or new funds, to pay or reimburse the State's share of such transportation acquisition.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
By /s/ GRACE KELLER
Chief Deputy

Re: *Bradley* v. *Milliken* - No. 75-1668

EDWARDS, Circuit Judge, concurring. I join my colleagues in the drafting and issuance of today's order because any final decision of the United States Supreme Court is the law of the land. But conscience compels me to record how deeply I disagree with the decision which we are enforcing. In *Milliken* v. *Bradley*, 418 U.S. 717 (1974), the Supreme Court overruled this court and the

[1] In *Milliken* v. *Bradley*, 418 U.S. 717, 726 (1974), the Supreme Court said:

"The District Court also found that the State of Michigan had committed several constitutional violations with respect to the exercise of its general responsibility for and supervision of, public education. [Footnote omitted.] The State, for example, was found to have failed, until the 1971 Session of the Michigan Legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned; during this same period the State provided many neighboring, mostly white, suburban districts the full range of state-supported transportation."

United States District Court in Detroit by reversing a carefully documented finding of fact that racial desegregation in the schools of Detroit could not be accomplished within the boundaries of the Detroit school district where the school population was found to be approximately 64% black, with a predicted 72% black school population by 1975-76 and 80.7% by 1980-81. The decision also imbued school district boundaries in Northern states (which like Michigan, had never had school segregation laws) with a constitutional significance which neither federal nor state law had ever accorded them.

This court's opinion in *Bradley* v. *Milliken*, 484 F.2d 217 (6th Cir. 1973), had accepted a finding by the District Judge that a desegregation plan limited to Detroit "would result in an all black school system surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area." The Supreme Court did not overturn that finding.

The key sentence in the majority opinion of the Supreme Court reads: "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." Presumably this means that if and when the Detroit school district becomes 95% or more black, immediately surrounded by suburban school districts 95% or more white, no problem of federal constitutional significance arises.

Unless the thrust of this sentence is altered by further Supreme Court interpretation or overruling—or by action in the area of racial integration by Congress or the Presidency—it can come to represent a formula for American apartheid.

Since the Supreme Court decision is based in part upon the fact that (like all Northern states) Michigan never had school segregation by state statute, the case creates one law for the North and another for the South.

I know of no decision made by the Supreme Court of the United States since the Dred Scott decision (*Scott* v. *Sanford*, 60 U.S. (19 How.) 393 (1857)) which is so fraught with disaster for this country.

(Title of Court and Cause)

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

On receipt and consideration of defendant Detroit Board of Education's emergency petition for rehearing of this court's order dated June 19, 1975,

Said petition is hereby denied and the mandate of this court will issue forthwith. In the circumstances, any application for stay should be made to the United States Supreme Court, or a Justice thereof.

Entered by order of the Court
John P. Hehman, Clerk
By: /s/ GRACE KELLER
Deputy Clerk

United States Constitution, Amendment XIV, Section 1, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution of 1963, Art. 8, § 2 provides:

Free public elementary and secondary schools; discrimination.

SEC. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

Michigan Constitution of 1963, Art. 8, § 3 provides:

State Board of education; duties. SEC. 3. Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.

Superintendent of public instruction; appointment, powers, duties. The state board of education shall appoint a

superintendent of public instruction whose term of office shall be determined bp the board.

He shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He shall be the principal executive officer of a state department of education which shall have powers and duties provided by law.

State board of education; members, nomination, election, term. The state board of education shall consist of eight members who shall be nominated by party conventions and elected at large for terms of eight years as prescribed by law. The governor shall fill any vacancy by appointment for the unexpired term. The governor shall be ex-officio a member of the state board of education without the right to vote.

Boards of institutions of higher education, limitation. The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section.

Michigan Constitution of 1963, Art. 5, § 18 provides:

Budget; general and deficiency appropriation bills. SEC. 18. The governor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state. Proposed expenditures from any fund shall not exceed the estimated revenue thereof. On the same date, the governor shall submit to the legislature general appropriation bills to embody the proposed expenditures and any necessary bill or bills to provide new or additional revenues to meet

proposed expenditures. The amount of any surplus created or deficit incurred in any fund during the last preceding fiscal period shall be entered as an item in the budget and in one of the appropriation bills. The governor may submit amendments to appropriation bills to be offered in either house during consideration of the bill by that house, and shall submit bills to meet deficiencies in current appropriations.

Michigan Constitution of 1963, Art. 9, §§ 1, 11, 13, and 14 provide:

Taxes for state expenses. SECTION 1. The legislature shall impose taxes sufficient with other resources to pay the expenses of state government.

State school aid fund, source and distribution. SEC. 11. There shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education and school employees' retirement systems, as provided by law. One-half of all taxes imposed on retailers on taxable sales at retail of tangible personal property, and other tax revenues provided by law, shall be dedicated to this fund. Payments from this fund shall be made in full on a scheduled basis, as provided by law.

Public bodies, borrowing power. SEC. 13. Public bodies corporate shall have power to borrow money and to issue their securities evidencing debt, subject to this constitution and law.

State borrowing; short term. SEC. 14. To meet obligations incurred pursuant to appropriations for any fiscal year, the legislature may by law authorize the state to issue its full faith and credit notes in which case it shall pledge undedicated revenues to be received within the same

fiscal year for the repayment thereof. Such indebtedness in any fiscal year shall not exceed 15 percent of undedicated revenues received by the state during the preceding fiscal year and such debts shall be repaid at the time the revenues so pledged are received, but not later than the end of the same fiscal year.

MCLA § 388.1007 Body corporate; powers.] SEC. 7. The state board of education is a body corporate and may purchase, have, hold, possess, enjoy, grant, alien, invest, sell, and dispose of real and personal property of every kind; may sue and be sued, plead and be impleaded in all the courts in this state; may have, use, alter and renew a seal; and may make such ordinances, bylaws and regulations as it deems proper for the government and conduct of the board and for the transaction of its business and the operation of the state institutions under its control if they are not repugnant to the constitution or laws of this state or of the United States. [MSA § 15.1023(7)]

MCLA § 388.1008 Gifts and grants; acceptance; special funds.] SEC. 8. The state board of education may take by gift, grant from federal or other sources, devise, bequest, or in any other lawful manner, property, money, pledges or promises to pay money for the purpose of carrying on any of its powers and duties and may, with the approval of the legislature, use the same for the purposes for which they were donated. The board may place such moneys in a special fund to be spent under its direction for the purposes for which they were donated subject to the conditions of such gift, grant, devise or bequest. [MSA § 15.-1023(8)]

MCLA § 388.1101 Short Title.] SEC. 1 This act shall be known and may be cited as the • ["Gilbert E. Bursley school district equalization act of 1973"]. [MSA § 15.1919(501)]

MCLA § 388.1107 Rules; promulgation; reporting of violations.] SEC. 7. The state board shall promulgate rules necessary to implement this act in accordance with and subject to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the [Michigan] Compiled Laws •. [The rules which affect the distribution of some form of school aid shall not be promulgated later than the third Friday of January of the year following legislative enactment of the programs. The joint legislative committee on administrative rules shall report any violations of this section to the legislature and the governor.] [MSA § 15.1919(507)]

MCLA § 388.1108 Appropriation; allocation.] SEC. 11. There is appropriated from the school aid fund established by section 11 of article 9 of the constitution of the state for • [the] fiscal year [ending June 30, 1974, and for each fiscal year thereafter], the sum necessary to fulfill the requirements of this act. • [There is] appropriated from the general fund • [for the fiscal year ending June 30, 1974, and for each fiscal year thereafter, the sum necessary to meet any deficiency]. The appropriation shall be allocated as provided in this act. [MSA § 15.1919(511)]

MCLA § 388.1121 Sums allocated to district; levy of taxes.] SEC. 21. (1) Except as otherwise provided in this act, from the amount appropriated in section 11 there is allocated to every district a sum determined as provided in [this] subsection •.

• The sum allocated to each school district shall be [an amount per membership pupil to be] computed • [by subtracting, from $38,000.00 in 1973-74, $39,000.00 in 1974-75 and $40,000.00 in 1975-76, the district's state equalized valuation behind each membership pupil and then multiplying the resulting difference by the tax levied for purposes included in the operation cost of the district as defined in section 582 of the school code of 1955, as amended, being section 340.582 of the Michigan Compiled Laws, up to and including 22 mills in 1973-74, 25 mills in 1974-75 and without limitation thereafter.

A tax levied pursuant to section 681(4)(b) of the school code of 1955, as amended, being section 340.681 of the Michigan Compiled Laws, for the retirement of an operating deficit shall be considered levied for operating purposes in making computations under this section.

Alternative allocations.](2) A district may receive for 1973-74, in lieu of the amount computed under subsection (1), an amount per membership pupil equal to the membership aid per pupil received for 1972-73 minus 20 mills multiplied by the increase in state equalized valuation behind each pupil in 1973-74 over 1972-73, or an amount per membership pupil equal to the membership aid per pupil received for 1972-73 minus the 1972-73 millage levied for operating purposes multiplied by the increase in state equalized valuation behind each pupil in 1973-74 over 1972-73, whichever is greater. This subsection shall expire June 30, 1974.

District levying less than 20 mills.] (3) A district levying less than 20 mills for operating purposes may utilize for the purpose of computing its allocation under subsection (1) an amount of operating millage equal to

the amount levied plus ⅔ in 1973-74 and ⅓ in 1974-75 of the amount by which 20 mills exceeds the amount levied. This subsection shall expire June 30, 1975.

Reorganization of districts; amount of aid for new districts.] (6)] Whenever 2 or more districts are reorganized into a single district, either through a procedure of annexation or consolidation, the amount of state aid to be received by the new district during the 2 years immediately subsequent to the annexation or consolidation shall not be less than the total sum of state aid which was earned by all the districts forming the new district during the last fiscal year in which the districts received aid as separate districts, except that no more than $400,000.00 shall be allocated under this subsection. [MSA § 15.1919(521)]

MCLA § 388.1125 Reduction of valuations; conditions; manner.] Sec. 25. The valuations of any district shall be reduced under the following conditions and in the following manner.

(a) An application may be filed by the district in form and content as described by the department showing the total taxes levied on property located within the district by all taxing agencies including the school district but excluding taxes levied for school operating purposes.

(b) Using the total taxes for the prior year as last reported by the state tax commission for the entire state but excluding taxes levied for school operating purposes, the department shall determine the tax rate for the entire state. It shall determine the tax rate for the applicant district by dividing the figure obtained in subdivision (a) by the district's prior year valuation.

(c) If the resulting tax rate for the applicant district is 125% or more of the resulting tax rate for the dis-

tricts of the state, the valuation of the applicant district shall be reduced by the percent by which the resulting tax rates in the applicant district exceeds 125% of the resulting tax rates in all districts of the state. Not more than [$26,500,000.00] shall be allocated as the result of reduction of valuation under this section. [MSA § 15.1919(525)]

MCLA § 388.1171 Transportation allotments; amount; limitations; measurement of distance.] SEC. 71. (1) Districts transporting pupils from the vicinity of their homes to the schools they attend and return shall be granted allotments from the school aid fund in amounts determined by the department but not to exceed 75% of the actual cost of the transportation. Allotments shall not be granted for the transportation of children living within 1½ miles of the schools they attend. Transportation distances shall be measured along public streets and highways.

Conditions.] (2) Although the children may live 1½ miles or more from the schools they attend allotments shall not be granted for the transportation of children living within the corporate limits of cities or villages unless 1 of the following conditions exists for the children transported:

(a) The children transported live in a district organized prior to July 1, 1955 as a township or a rural agricultural school district.

(b) The children transported live within a district and within city or village limits the major portion of which is in a district organized prior to July 1, 1955 as a township or rural agricultural school district.

(c) The children transported live within a city or village and the larger pupil population of the city or village

is contained in another single district and no school the children can attend is operated in the portion of the city or village within the district.

(d) The children transported live in a district, containing 2 or more cities or villages or parts of 2 or more cities or villages, operating 1 high school and 1 junior high school or 1 combination junior-senior high school and the children transported are enrolled in grades 7-12 and the school building in which these grades are taught is located outside the corporate limits of the city or village in which they reside.

(e) The children live within a district and within city or village limits and attend a public school located outside any city or village.

(f) The children live within a district and within a city or village and the shortest available route requires a bus to leave the city or village over streets or highways outside of any city or village and return to the city or village in which their public school is located and they ride in the bus at the time of exit from the city or village.

(g) The children live within a district and are transported to another district for education in grades not provided in the district in which they reside.

Review of decision of board.] (3) Upon investigation the department shall review, confirm, set aside or amend the action, order or decision of the board of any district with reference to the routes over which children shall be transported, a distance they shall be required to walk, and the suitability and number of vehicles and equipment for the transportation of the children.

District operating disapproved bus route.] (4) An allotment for transportation shall not be allowed a district

which operates a bus route disapproved by the department. [MSA § 15.1919(571)]

MCLA § 388.1179 Busing to achieve racial balance; restriction on use of funds.] SEC. 79. No appropriations allocated under this act for the purpose of covering transportation costs or any portion thereof shall be used for the payment of any cross busing to achieve a racial balance of students within a school district or districts. [MSA § 15.1919(579)]

PARTIAL TRANSCRIPT OF PROCEEDINGS AND TESTIMONY

Proceedings had in the above-entitled cause before Honorable Robert E. DeMascio, United States District Judge, at Detroit, Michigan.

SESSION OF WEDNESDAY, MAY 7, 1975

[82]

ALFRED M. PELHAM
DIRECT EXAMINATION BY MR. ROUMELL

Q Mr. Pelham, is there an organization known as the Task Force for Education in the City of Detroit?

A There is, it is called the Detroit Education Task Force. It has been in existence since January, 1973.

Q Could you tell us what your connection is, if any, with that task force?

A I am serving as one of three co-chairmen with Stanley Winkleman and Dr. Ethelene Crockett. The task force is made up of about 60-odd members in addition to the co-chairmen.

Q Can you tell us what the function of the task force is?

A It came into being actually by appointment of the Detroit Board of Education in the latter part of 1972 at a time when the Detroit School system was facing a very serious financial crisis with a threat that schools might be closed by March 31, the following year, that is March 31, 1973. The Board was confronted by what was in their context a staggering deficit which earlier was estimated at about $75,000,000. Actually it turned out to be in the area of $68,000,000.

• • •

[85]

Q Mr. Pelham, by virtue of Public Acts One and Two could you tell us whether or not the State of Michigan placed a requirement on the Detroit Board in connection with its budget?

A It did. The proviso was that all subsequent budgets had to be in balance and had to be presented to the State Department of Education for approval prior to the time the City of Detroit School District could get any state aid.

Q In other words, the budget must be balanced, is that correct?

A That is correct.

Q You just testified that the Detroit Board is projecting it will need $28,000,000 more next year than it is receiving this year?

A That is correct.

Q Is that for operating expenses?

A That is exclusively for operating expenses. I might add that gratuitously it provides for a level of operation substantially the same as that of the current fiscal year level.

Q Based upon your knowledge of the Detroit School system, based on the present State aid, could you tell us whether or not in your opinion the system can absorb any more costs?

A It cannot absorb any additional costs. As a matter of fact without this $28,000,000 which they are requesting
[86]
they will not even be able to continue the present level of operation.

Q You are talking about operations as they are going on in 1974-75 school year?

A That is correct.

• • •

Q There is a suggestion in that report that the Detroit School District could levy additional millage. Do you have an opinion as to the ability of the Detroit School system to levy additional millage at the present time?

A The Detroit School District does not have the power to levy additional millage without a favorable vote on additional millage by the electorate of the City of Detroit. It cannot unilaterally levy such millage. As a matter of fact, last fall the Detroit Board did seek to increase the millage by a vote of the people and that was turned down by the electorate.

My judgment is that at the present time having been turned down when economic conditions were substantially
[87]
better in the City of Detroit than they are now that for that and other reasons it would be totally unlikely that a favorable vote on additional millage could be secured. Added to that is the fact the City of Detroit is currently levying the highest tax burden against its citizens of any

city in the State by a considerable amount, as a matter of fact, at a ratio of about three to one in relation to the 20 other largest cities in the State of Michigan.

• • •

[105]

A The differential there is 21.21 mills for all other purposes in Allen Park as against Detroit's 62.32 differential. As a matter of fact for the 20 largest cities in the State of Michigan the average city tax for all purposes, this includes both property and excise income tax or utility tax, the average for all Michigan cities is 15.90 mills. The [106]
average for the 20 largest Michigan cities is 16.19 mills and the figure in Detroit is 49.62 mills. This excludes school tax and county tax. In other words, Detroit is paying more than three times as much as the average for all Michigan cities and the average for Michigan's 20 largest cities.

• • •

[92]

A . . . The reason has been that for many years there has been an outflow from the City of Detroit to suburbia not only of individuals but of industry and in the case of industry it is related to the changes in industrial technology which requires a different type of plant, large square footage area plants on a single level rather than on a multi-story level. The space has not been available in the City of Detroit to provide for such plants so that as the older plants in Detroit deteriorated it became necessary to replace them and there was an exodus of industry out of the City of Detroit. The exodus of people from the City of Detroit has also brought an exodus of certain commercial institutions into the suburban areas of the

metropolitan area and, of course, this in combination has had a very serious impact upon the City of Detroit as have a number of other factors including the huge amounts of acreage that have been carved out for the construction of expressways and the unfortunate experience that Detroit has had with the urban renewal housing where much of this has deteriorated and as buildings have been demolished they have gone off the tax rolls.

These factors in combination are the reasons why Detroit's SEV has not increased in contrast with the rest of the State of Michigan.

• • •

[100]

Q Next to Detroit how many mills are listed?

A 84.83 mills.

Q Will you explain to the Court what that figure is, what does it constitute?

A It's made up of four major components. It includes the county tax at 7.07 mills. It includes the school millage which includes intermediate and community college millage of 28.14 mills. It includes Detroit property taxes of 30.16 mills, and it includes non-property taxes, income and excise equated into millage at the rate of 19.46 mills.

Q That would include the tax on your public utility bills in Detroit?

A That's correct.

Q You are telling the Court that the citizens living in the City of Detroit pay a total equivalent of 84.83 mills?

A That's correct.

Q Including school tax?

A Including school tax.

• • •

[104]

Q This municipal overburden that we speak of and which has been demonstrated by Exhibit 30, do you have an opinion as to what affect, if any, it has on the ability of the citizens of Detroit to absorb any additional tax burden?

A I certainly have an opinion and I think it is pretty largely borne out by experience and by public attitudes that the tax payers of the City of Detroit feel, and I think we feel quite properly, that there is being levied against them a total tax burden which is a high as or higher than they can afford to pay.

• • •

[119]

Q The State in their critique has pointed out that we are receiving then in the Detroit district about 90 per cent of that?

A 91 per cent, I believe, to be exact.

Q Could you tell the Court today how much the Detroit Board is receiving from the State of Michigan on the municipal overburden theory?

A In the current year approximately $24,103,000.

Q Mr. Pelham, is the provision in the present State Aid Act fully funded?

A No, it's not. It is funded to the extent of about 28.1 per cent of the formula.

Q Presently in Michigan under the formula the legislature is only funding it 28 per cent?

A Approximately.

• • •

Proceedings had in the above-entitled matter before the HONORABLE ROBERT E. DeMASCIO, United States District Judge, at Detroit, Michigan.

SESSION OF TUESDAY, JUNE 3, 1975

CLEMENT S. SUTTON

DIRECT EXAMINATION BY MR. ROUMELL

* * *

[103]

Q All right. Mr. Sutton, could you—the next line of questions are directed to in-city transportation as contrasted to the special education transportation.

Can you tell us whether or not the Detroit Board of Education receives any State aid for in-city transportation.

A Yes, we do receive State aid reimbursement for certain in-city transportation costs.

Q How long has the City of Detroit been receiving in-city transportation reimbursement?

A This is the second year that we have received some reimbursement from the State.

Q Referring to the 1974-75 school year?

A That's correct.

* * *

[104]

Q And prior to the 1973-74 school year, are you telling this Court that the City of Detroit Board of Education did not receive reimbursement for in-city transportation?

A That is correct, we did not receive reimbursement for in-city transportation.

Q Now, Mr. Sutton, do you know whether prior to 1971, the State was reimbursing the transportation costs of rural districts?

* * *

[105]

A I believe the districts such as you mentioned were receiving such reimbursement, yes.

THE COURT: Are you sure?

THE WITNESS: I am sure that they were receiving such reimbursement.

THE COURT: Rural areas?

THE WITNESS: That's correct.

* * *

[121]

THE WITNESS: To my knowledge, Your Honor, there were no disallowed costs in the reimbursement that we received. The reimbursement as I understand it in the application of the formula for in-city transportation and the problems that occurs in the city like Detroit is that we are reimbursed on the basis of 75 percent. But it's 75 percent of Wayne County average per pupil transportation cost. For example, in 73-74, our average per pupil cost for in-city transportation was 185 dollars. The Wayne County average was 46 dollars. We received 75 percent. It was 75 percent of 46 dollars, not 75 percent of Detroit's cost which would be 185 dollars.

* * *

[131]

Q According to Exhibit 6, you had 289 thousand students, 457, and in 74 you had 257 thousand. You don't have one-half the number of students now, do you?

A Certainly not. And of course, costs have gone up disproportionately to that drop in enrollment.

Q Am I correct that under State law, the Board of Education has to furnish free, supplies and text books to all pupils?

A That is correct.

Q And the 7 million dollars you're talking about restoring, the cuts from 73-74 budget would go to text books and supplies?

A Yes, in part.

Q Plus substitutes?

A Plus substitutes, plus equipment.

Q I want to talk about building and operations. What are you talking about restoring there?

[132]

A In that area, we'd be talking about providing adequate maintenance for grounds, for just simple things like grass cutting, maintaining our athletic field. We've got painting of buildings that at one time were supposed to be on a five year schedule. It's now on a nine or ten year schedule. We'd be talking about trying to improve our schedule on building maintenance in the painting area. We would also be talking about providing more timely maintenance to just things like repairing roofs, repairing toilets, other things of this nature, that because of an inadequate budget, we've just not been able to do on a timely or responsive basis. And of course, this contributes, frankly, to the health and safety of the children.

Q And you're just restoring this to 73-74?

A That's right.

Q You mentioned the survival budget of 71-72. Is it my understanding that this budget is continuing on?

A Yes, it is. It started in January of 71 and that year, about 16 million dollars was cut out of the budget. And since that time, we have not been able to restore any of those services. We have continued those cuts. There have been additional economy measures instituted since then

and, of course, the most recent one was the emergency cut in 73-74.

• • •

[134]

Q Now, I would like to know if, as the Chief Fiscal Officer of the Detroit Board of Education, you are telling this Court that for the coming year, in order for the Board to continue its current reduced program, taking into account the some 8 thousand students attrition, as matters now are projected, you're projecting a 21 million dollar deficit?

A That's correct.

Q And it would be 28, if you restored the minimal services?

A That's correct.

MR. ROUMELL: Pardon me, Your Honor.

Q (By Mr. Roumell) Mr. Sutton, based upon our just completed discussion, could you tell us whether the Detroit Board of Education can financially continue a balanced budget and keep the same services it had in 1974-75 school year, finance any additional transportation over that which it is doing now?

A No, we cannot.

• • •

[146]

[A] In Detroit, the county taxes, as shown 7.07 mills, the State wide average is 6.18 mills. So, Detroit is about 14.4 percent higher in that category.

For school taxes, this is the local, the intermediate school district as well as the community college. Total millage in Detroit 28.14 mills against the State wide average of 32.42 mills. So in Detroit, school taxes are actually lower than

the State wide average by about 15.2 percent. Looking at the municipal taxes, municipal property taxes, city of Detroit in terms of the school district here, the village township taxes on the State wide averages as well as other municipalities, 30.16 in Detroit, 12.24 State wide average. Detroit is about one and a half times higher than the State wide average in terms of local taxes, 146 percent higher. So, looking at total property taxes, Detroit taxpayers pay 65.37 mills as compared with 50.84 mills as a State wide average or 28.58 percent higher. Extending that down into non-property taxes shown as a millage equivalent and for Detroiters that would relate to the 10 percent personal income tax as well as the utility taxes which amounts to [147]
another 3 mills, the income tax is about 16 mills, utility taxes in Detroit equate to about 3 mills as an equivalent tax.

19.46 mills in Detroit, 3.68 mills as State wide average. The grand total millage equivalent of taxes paid by taxpayers of Detroit is 84.83 mills as compared with 54.52 mills as a State wide average of 55 percent higher than the State wide average. This is what's commonly referred to as the municipal tax over burden, which I believe other witnesses have spoken to, that is felt by residents of Detroit. When you compare the total taxes to the level of school taxes, school tax is not unreasonably high. As a matter of fact, as I have indicated, it's less than the State wide average. But when you add to that local school tax, all other taxes, you come to a total cumulative level that is greatly in excess of the State wide average and what tax burden is felt by other taxpayers throughout the State. This is what contributes to the difficulty of raising taxes in Detroit for schools by an additional levy because the

ordinary taxpayer is certainly most concerned about his total tax bill, and not necessarily about the school portion as it relates to other portions of that tax.

• • •

[148]

Q (By Mr. Roumell) And on the bottom of the chart, I see you have a memo and what is that memo?

A These are the total taxes excluding the school taxes, all city, village, township property and non property for Detroiters, 49.62 mills. Statewide average 15.92 or 211 percent higher. This relates to the non school taxes that are paid by residents of Detroit, as compared with the State wide average of the same types of facts.

Proceedings had in the above entitled matter before the HONORABLE ROBERT E. DeMASCIO, United States District Judge, at Detroit, Michigan.

SESSION OF TUESDAY, JUNE 10, 1975
ROBERT N. McKERR

• • •

[168]

THE COURT: Well, they received that as the computation of 92 percent of 75 percent of the amount.

THE WITNESS: That is correct.

THE COURT: There was some testimony here that the city of Detroit was restricted to that 92 percent of 75 percent, where as other school districts were reimbursed

[169]

75 percent, the entire 75 percent.

THE WITNESS: The facts are that Detroit and a number of other city school districts were reimbursed at 92 percent of 75 percent, which is for what is called in-city

transportation. The other school districts in the state did receive, under the State School Aid Act, reimbursement for the full 75 percent. This occurs because there are separate appropriations for in-city transportation and for what we in the Department call regular transportation, including all other transportation.

COURT, U. S.

Supreme Court, U. S.
FILED
OCT 9 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-394

BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class, et al.,

Petitioners,

—vs.—

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-394

BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class, et al.,

Petitioners,

—vs.—

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions, statutes and administrative rules are U.S. Const. Amend. XI; Mich. Const. 1963, art 9, § 17, Section 594 of 1955 PA 269, MCLA 340.594; MSA 15.3594; Section 71(1) of 1972 PA 258, as amended by 1975 PA 261, MCLA 388.1171; MSA 15.1919(571); and R 340.276, 1972 Annual Administrative Code Supplement, p 6165, all of which are set forth seriatim in the Appendix beginning at 1a.

STATEMENT OF THE CASE

This brief is filed on behalf of respondents Governor, Attorney General, State Board of Education, Superintendent of Public Instruction and State Treasurer of the State of Michigan, sometimes referred to herein collectively as Milliken, et al. These respondents accept the statement of the case contained in the petition insofar as it sets forth the procedural history of this case.

The petitioners' claims concerning the alleged desperate financial condition of the Detroit school system run throughout their petition. It is not the function of this brief in opposition to correct all of the financial omissions and representations contained therein. However, when the Court of Appeals entered the order here in dispute, it had before it the following two uncontroverted facts:

1. For the 1973-1974 school fiscal year, out of 531 Michigan school districts operating K-12 educational programs, 463 of such school districts had *lower* current operating expenditures per pupil than the Detroit school system, which ranked 68th from the top in current operating expenditures per pupil.

2. For the same school fiscal year, the Detroit school system's revenues exceeded its expenditures by slightly over 7 million dollars.

ARGUMENT

THE PETITION SHOULD BE DENIED FOR LACK OF MERIT.

A. The order sought to be reviewed is in conformity with the decisions of this Court.

In *Milliken* v *Bradley*, 418 U.S. 717 (1974), this Court remanded this cause for the implementation of a desegregation remedy within the Detroit school system. During the course of the subsequent remedial proceedings, Milliken, et al, have consistently taken the position that the legislatively appropriated state school aid funds disbursed to the Detroit school system may be used by it for implementation of a pupil desegregation remedy.[1] Thus, this cause is in marked contrast to *North Carolina State Board of Education* v *Swann*, 402 US 43 (1971), where this Court held invalid a state statute precluding the use of any public funds for transportation to achieve desegregation.

Respondents Milliken, et al, have, however, consistently opposed attempts by both plaintiffs and petitioners herein to secure judicial relief below to compel the payment by them of additional, unappropriated funds from the State Treasury to be utilized in implementing a desegregation remedy. This opposition is grounded upon the following basic legal principles.

First, it is settled law that the nature of the violation deter-

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[1] In addition to its local property tax revenues and federal funds, the Detroit school system received approximately 155 million dollars in legislatively appropriated state school aid funds for the 1974-1975 school fiscal year.

mines the scope of the remedy. *Swann* v *Charlotte-Mecklenburg Board of Education*, 402 US 1, 16 (1971); *Milliken* v *Bradley, supra*, 418 US, at 738. In this cause, this Court has previously determined that there is no constitutional violation in the area of school district finance, *Milliken* v *Bradley, supra*, 418 US at 751-752, relying on *San Antonio School District* v *Rodriguez*, 411 US 1 (1973). Thus, there is no legal predicate for compelling Milliken, et al, to pay out additional, unappropriated funds from the State Treasury to or for the benefit of the Detroit school system.

Second, an order compelling Milliken, et al, to pay out additional, unappropriated funds from the State Treasury would contravene the Eleventh Amendment and this Court's holding in *Edelman* v *Jordan*, 415 US 651 (1974), that the federal courts are precluded from compelling the payment of state funds from the State Treasury. The order entered below by the District Court and modified on appeal concerning the acquisition of and payment for 150 school buses (Petitioners' Appendix at p 5a) is not prospective injunctive relief to conform one's conduct to federal law that has, at most, an ancillary effect on the State Treasury. *Edelman* v *Jordan, supra*, 415 US, at 667-668. Rather, it is a direct order to pay unappropriated funds from the State Treasury, i.e., a prohibited award of money damages against the State of Michigan.

Third, in *Griffin* v *County School Board of Prince Edward County*, 377 US 218, 233 (1964), this Court ruled that the trial court could compel the County Board of Supervisors "to exercise *the power that is theirs* to levy taxes" to operate a unitary public school system. (emphasis added) Under Michigan law, none of the respondents, Milliken, et al, have any lawful authority or power to disburse additional, unappropriated funds from the State Treasury to pay 100% of the cost of acquiring school buses for use by Detroit or any other Michigan

school district. Mich Const 1963, art 5, § 18 and art 9, § 17. The *Griffin* case, *supra,* is authority for compelling local officials to use their lawful fiscal powers under state law to operate a unitary school system. It is not authority for the proposition that federal courts may compel the payment of additional, unappropriated funds from the State Treasury to finance school desegregation remedies. *Edelman* v *Jordan, supra,* 415 US, at 667, n 12.

B. The order here under attack is consistent with state law in accordance with sound principles of federalism.

The Court of Appeals order here under attack compels the Detroit Board of Education to acquire 150 school buses and requires Milliken, et al, *to pay or reimburse* 75% of the costs of such acquisition. Further, the Court of Appeals order modified the District Court's order to be "consistent with the spirit and purposes of the constitutional and statutory provisions and the case law of the State of Michigan." (Petitioners' Appendix, p 8a)

The Detroit Board of Education has the statutory authority to acquire school buses and to issue its obligations for such purpose for a 6 year period, pledging in payment its general fund property tax revenues and state school aid funds. Section 594 of 1955 PA 269, MCLA 340.594; MSA 15.3594. (Respondents' Appendix, p 1a) Further, Detroit, like all other Michigan school districts, is eligible to receive up to 75% reimbursement, from legislatively appropriated state school aid funds, of the cost, including interest costs, of acquiring school buses over a 7 year period. Section 71(1) of 1972 PA 258, as amended by 1975 PA 261, MCLA 388.1171; MSA 15.1919 (571) and R 340.276, 1972 Annual Administrative Code Supplement, p 6165. (Respondents' Appendix, pp 1a-3a)

On or about September 9, 1975, the Detroit Board of Education sold its notes in the amount of $2,675,000.00 to finance the purchase of 150 school buses, with such notes to be paid over a six year period. Thus, the Detroit school system has the borrowed funds to fulfill its bus purchase contracts with the bus vendors. Further, the Detroit school system will receive legislatively appropriated state school aid categorical transportation funds, over a seven year period, in reimbursement of 75% of its bus purchase costs. This is essentially the same financial result that would obtain, under state law, irrespective of whether Milliken, et al, were included in the order of the Court of Appeals here under scrutiny.

One additional financial reality should be noted. The Detroit Board of Education, in paying 25% of the bus purchase costs, may utilize both its local property tax revenues *and* its general purpose state school aid funds. Sections 18, 21 and 25 of 1972 PA 258, as amended by 1975 PA 261, MCLA 388.1118; MSA 15.1919(518), MCLA 388.1121; MSA 15.1919(521), MCLA 388.1125; MSA 15.1919(525). In the 1974-1975 school fiscal year, Detroit received approximately 139 million dollars in local property tax revenues and 133 million dollars in general purpose state school aid funds.

The Court of Appeals order is consistent with state law. Under such order, the Detroit school system is successfully utilizing essentially the same financial procedures that all other Michigan school districts utilize in acquiring and paying for school buses. This result is in accord with sound principles of federalism that state systems of raising and disbursing funds for public education are entitled to judicial deference rather than strict judicial scrutiny. *Rodriguez, supra,* 411 US, at 44.

C. The order sought to be reviewed is not in conflict with the decisions of other Courts of Appeals.

Petitioners claim that the order of the Sixth Circuit Court of Appeals herein is in conflict with the decisions of other courts of appeals. However, a cursory examination of the cases cited by petitioners on this point reveals that no such conflict exists. None of the cases cited by petitioners hold that the federal courts may compel the disbursement of additional, unappropriated funds from the State Treasury to finance the purchase of buses for a school desegregation remedy.

The case relied upon most heavily by petitioners to show an alleged conflict among the circuits is *United States* v *State of Missouri*, 515 F2d 1365 (CA 8, 1975). However, that case dealt with the local maximum property tax rate to be established in a school district formed for desegregation purposes by the merger of three pre-existing school districts. The district court had established the tax rate at a level above that approved under Missouri law by the voters in any of the three school districts to be merged. On appeal, the Eighth Circuit Court of Appeals reversed the trial court and established, as the maximum tax rate, the highest of the three tax rates previously approved by the voters in the three merged school districts, noting that the Missouri Constitution requires a uniform tax levy within the geographical limits of the taxing authority. *United States* v *State of Missouri, supra*, 515 F2d, at 1371-1373.

Thus, such case is not authority for the proposition that the federal courts may, in disregard of state law, and the Eleventh Amendment, compel the payment of additional, unappropriated funds from the State Treasury to finance a school desegregation remedy. Rather, the Eighth Circuit Court of Appeals decision relied upon by petitioners kept the maximum local tax rate within the limits previously set by the voters in

one of the three school districts to be merged and applied it to the new school district pursuant to the uniformity requirements of Missouri law.

CONCLUSION

The order entered below is in conformity with the prior decisions of this Court. The financial result contained therein fits Michigan law in terms of acquiring and paying for school buses by local school districts. The order sought to be reviewed is not in conflict with the decisions of other courts of appeals. Therefore, respondents Milliken, et al, request this Court to enter its order denying the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

U.S. Const. Amend. XI:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Mich. Const. 1963, art 9, § 17:

> "No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

Section 594 of 1955 PA 269, MCLA 340.594; MSA 15.3594:

> "The board of any district furnishing transportation may purchase buses on title-retaining contracts or by the issuance of obligations of the district therefor, pledging in payment moneys in the general fund or funds received from the state for aid in the support of the public schools: Provided, That such obligations issued for this purpose shall not be issued for a longer time than the estimated period of usefulness of the buses for which issued, as determined by the board, and in no event for a longer period than 6 years."

Section 71(1) of 1972 PA 258, as amended by 1975 PA 261, MCLA 388.1171; MSA 15.1919(571):

> "(1) From the amount appropriated in section 11, there is allocated not to exceed $62,800,000.00 to reimburse districts and intermediate districts transporting pupils from the vicinity of their homes to the schools they attend, or from their homes or schools to area vocational

centers or other facilities providing approved occupational programs and back again in amounts determined by the department but not to exceed 75% of the actual cost of the transportation. The rate of reimbursement for contracted transportation services or transportation services provided through the use of public transit systems shall be the same as for school district owned bus fleets. Reimbursement shall not be granted for the transportation of children living within 1½ miles of the schools they attend, except for handicapped children, as defined in rules promulgated by the state board, whom the department determines cannot safely walk the distance, and persons in attendance at alternative education programs for pregnant persons. Transportation distances shall be measured along public streets and highways."

R 340.276, 1972 Annual Administrative Code Supplement, p 6165:

"Rule 6. (1) Depreciation of a school bus shall be the actual cost of the bus, plus interest on funds borrowed for the purchase, less trade-in allowances or amounts received for buses replaced equally divided over a 7 year period. Depreciation shall not be allowed for a bus, used or new, in operation for 7 or more years except that all buses being depreciated over 10 years at the time this rule takes effect shall have the remainder of their depreciation credited as follows:

Years of Depreciation	Percentage of Cost Plus Interest
10	10%
9	20%
8	30%
7	40%
6	35.8%

5	31.5%
4	27.2%
3	22.9%
2	18.6%

In the following years, the depreciation shall be 1/7 for not more than 7 years of the life of each bus. A school district purchasing a used bus may apply the undepreciated value of the bus against future depreciation in an amount equal to the number of years needed to make the total depreciation on the bus equal to 7 years in relation to the life of the bus at the time of its acquisition by the school district.

(2) Depreciation on a bus purchased after the effective date of this rule shall begin in the fiscal year it was accepted for use if acceptance was made on or before December 15 of the year. Depreciation shall begin in the following fiscal year if acceptance was made on or after December 16 of the fiscal year.

(3) Buses purchased on a lease-purchase contract shall be treated as a purchase and depreciated according to subrule (1)."